Petition

Office - Supreme Court, U.S.
FILED
FEB 16 1982
ALEXANDER L. STEVAS
CLERK

81-1541

* * * * * * * * * * * * *

NO.

* * * * * * * * * * * * *

DOYCE ALON BALLENGER,

Petitioner

v.

THE STATE OF ALABAMA,

Respondent

* * * * * * * * * * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE

COURT OF CRIMINAL APPEALS OF ALABAMA

* * * * * * * * * * * * *

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ATTORNEYS FOR PETITIONER

QUESTION PRESENTED

Whether the petitioner was denied his most basic right to a fair and impartial trial as guaranteed by the Sixth Amendment and due process claude of the Fourteenth Amendment to the United States Constitution when after the conclusion of the trial the State of Alabama introduced and the court received, over timely objection, documentation which proved a material element of the charge with absolutely no supporting testimony.

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Williams v. State, Ala. Cr. App. 364 So. 2d 717.

McCurley v. State, 390 So. 2d. 25 (1980)

State v. Friedkin, 244 Ala. 494, 14 So. 2d. 363 (19 43)

STATUTES: Title Section 14-4 Code of Alabama 1975.

PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

* * * * * * * * *

Petitioner, Doyce Alon Ballenger, prays that a Writ of Certiorari be issued to review the judgment of the Alabama Court of Criminal Appeals entered on December 18, 1981, affirming his conviction under the provisions of Title 20 Section 2-20 et seq , otherwise known as the Alabama Uniform Controlled Substances Act. As charged in his indictment, and that upon such hearing being granted, the judgment of conviction be reversed

OPINION BELOW

The opinion of the Alabama Court of Criminal Appeals (app. A., infra,. p. 1a) has been reported and is included herewith Certiorari was denied by the Alabama Supreme Court without opinion.

JURISDICTION

The judgment of the Alabama Court of Criminal Appeals was entered on December 18, 1981, and following a refusal of certiorari by the Alabama Supreme Court, a stay of mandate pending possible review by this court was granted until February 16, 1982.

This Court has jurisdiction under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments to the United States Constitution and Title 15, Section 14-4, Code of Alabama 1975.

STATEMENT OF THE CASE

The petitioner along with one Henry Wayne Woods was allegedly involved in the sale of a large quantity of a supposedly illegal substance (viz., methaqualone). The State of Alabama contended that the case arose out of an undercover activity conducted by a jointly funded United Narcotics Detail operation in which, on July 14, 1980, the defendant was arrested in a motel room in Birmingham, Alabama. It was averred that police operatives Stan McAdams and William Carson were positioned, on that day, in a room at the Passport Inn where they were posing as large-quantity purchasers of narcotics. Shortly after they placed themselves, it is averred that Ballenger arrived and identified himself as the proper person to be given a large package of money. According to the State, simultaneously, Henry Wayne Woods (acting

in concert with Ballenger) was delivering to other operatives a suitcase filled with the pills averred to be illegal. As soon as the latter transaction had occurred (at a place some thirty miles distant), the petitioner was arrested on the theory of his complicity in the "drug" sale.

Following these occurrences, the petitioner and Woods were charged with selling methaqualone which was averred to be a substance prohibited under State law.

Petitioner's basic contention on appeal was based on the fact that at the conclusion of the State's case, the trial court noted that the state had completely failed to prove that the substance named was illegal at that time under extant Alabama law. Later, the trial court not only permitted the State to reopen its case (over objection) but also received into evidence some seven exhibits presumably relating to minutes of meetings of the State Board of Health which tended to prove that the material in question was indeed illegal by virtue of an administrative action by that same board Therefore, the petitioner complained, the trial court allowed "evidence" of a documentary nature to be

received sans any predicate whatsoever as to the papers source, origin, weight, authenticity, completeness or anything else. Moreover, this method of receiving the objected to evidence effectively cut off all possibility of any cross-examination as to the matters just alluded to and as a consequence totally domping any Sixth Amendment rights the accused may have had.

REASONS FOR GRANTING THE WRIT

The reasons for granting the writ are believed by the petitioner to be of large constitutional stature. If the Sixth Amendment to the Constitution is to be given its full meaning in Alabama, then the trial courts cannot receive evidence in such a fashion as to cut off in peremptory fashion all cross-examination relative to the credibility of such evidence absent some agreement to the contrary between the parties.

Petitioner respectfully submits that it has long been a Federal Constitional precept that the Sixth and Fourteenth Amendments to the United States Constitition jointly apply to State court criminal prosecutions in such a manner as to make the introduction and reception of evidence subject to certain basic and guaranteed rights. See U.S. v. Carr, 543 F. 2d. 1042, aka, U.S. v. De Stefano , 476 F. 2d. 324 (1973).

Of course, the most elemental and necessitous constitutional guarantee insures the right to thorughly cross-examine all prejudicial evidence to determine whether it is properly admissible at all and moreover what weight, if any, it should be given.

In the instant case, the trial judge held that a substance charged as being illegal to sell on a given date must be proved to have been illegal on that date. He also held that such proof had to be in the nature of real evidence and not, for example, a matter for judicial notice since the lawful or unlawful status of a given substance may well (and often does) vary from day to day.

In fact, the Alabama Court of Criminal Appeals has already held and seemingly still holds that if proof of a chemical's illegality is deficient, any conviction obtained under that state of affairs is inadequate and the matter should be reversed and the cause remanded to supply the missing evidence. See Cassell v. State, 55 Ala. app. 502, 317 So. 2d 348 and in particular McCurley v. State, 390 So. 2d 25 (1980) supported generally by State v. Friedkin, 244 Ala. 494, 14 So. 2d. 363 (1943) and Williams v. State, Ct. of Ala. Cr. App. 364 So. 2d. 717.

What happened in the case at the bar is really clear. The State simply forgot to try and prove that methaqualone was scheduled as illegal on the day of the "criminal" transfer. The trial court took note of the failure after the state had rested its case What happened wrong is equally clear. The trial court allowed the state to cover its ommission by merely receiving as substantive evidence a number of documents which seemingly supplied the missing element of proof but the reception was accomplished in such a way as to totally deny to the defendant any chance to attach either the prorprity or weight of the proffered documents. He was only permitted to object.

An even greater injustice was perpretrated when the State Appeals Court did not correct the constitutional wrong visited on the accused. In this particular instance, this learned court is the last repository for the petitioners hope that he will be afforded the opportunity to question the evidence used to convict him. Our constitution entitles him to no less

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been mailed, postage prepaid, this the 15th day of February, 1982, to:

Honorable Charles A. Graddick
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/s/ Arthur J. Hanes, Jr.
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Appendix

APPENDIX A

Aug. 4 1981

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1980-81

6 Div. 499

Doyce Alon Ballenger

v.

State

Appeal from Jefferson Circuit Court

HARRIS, PRESIDING JUDGE

Appellant was indicted by the Grand Jury of Walker County for selling tablets containing methaqualone, a controlled substance. Appellant had been tried twice on the indictment with both trials ending in mistrials because in each trial the jury was unable to reach a verdict. Appellant's counsel moved for and was granted a change of venue to Jefferson County.

This case arose out of an undercover operation conducted by UNDO, a combined police operation directed at drug violations. The officers involved were Birming-

ham Police Officers Stan McAdams, Michael Ware, Robert Lamm and Charles Jordan, and Jefferson County Sheriff's Officers Howard Brooks, William D. Carson, Norman Dale Harris and George House.

On July 14, 1980, McAdams and Carson were in a motel room at the Passport Inn Motel at 1100 8th Avenue South, Birmingham, Jefferson County, Alabama. The room had been wired so that Officers Brooks and Ware in the next room could hear what was said in McAdams' room. The microphone worked so that Brooks and Ware were able to hear what went on in the other room, but the tape recorder which was designed to record the conversations did not work.

At 11:30 in the morning, the appellant arrived at the motel in a pink Cadillac and went to Officer McAdams' room. The appellant knocked on the door, and, when McAdams answered it, the appellant said that he had come to pick up the package. "What package?", asked McAdams, and the appellant replied, "The package of money for the pills." Officer McAdams then let the appellant into the room and offered him a seat. Present in the room with Officer McAdams was Officer Bill Carson. Officers Brooks and Ware were listening to the conversations in the next room. The appellant discussed the

pills he was proposing to sell to the undercover agents. After a bit, the appellant asked to use the bathroom, and Officer McAdams asked him if he had a weapon. The appellant replied that he had no weapon, but the officer insisted on frisking him. No weapon was found.

After returning from the bathroom, the appellant discussed various proposed drug deals with the undercover officers. The appellant advised them that he could supply between two and five hundred pounds of marijuana a week. When McAdams replied that he didn't know if he could come up with that much money, the appellant offered to "front" McAdams with two hundred pounds of marijuana and give him seventy-two hours to raise the money to pay for it. The appellant also discussed the possibility of selling cocaine. The appellant advised McAdams and Carson that a five-pound block of 85% pure cocaine was available.

The purpose of the meeting between these undercover agents and the appellant was the purchase of controlled substances. McAdams had with him a suitcase containing in excess of $30,000 They were waiting for word from Officer Robert Lamm, also working undercover, that the pills had been received. At this time, Officer Lamm and Officer Charles Jordan were at Godfrey's Res-

taurant in Sumiton, Walker County, Alabama. They were there to meet the appellant's accomplice and receive the pills. They arrived at Godfrey's Restaurant at almost exactly the same time that the appellant was arriving at the Passport Inn in Birmingham. They sat down and a short time later the appellant's accomplice approached them and identified himself simply as "Wayne". After a short conversation, Wayne said, "I am ready to deal " They had to wait a few minutes for the telephone to get free and then Officer Lamm used the phone to call Officer McAdams at the Passport Inn in Birmingham. McAdams informed Lamm that the appellant was in McAdams' room.

Lamm and Jordan then went with Wayne to a 1978 Chevrolet Blazer automobile which Wayne had parked in the restaurant parking lot. It was later learned that this Blazer vehicle was registered to the appellant. Wayne opened the rear of the vehicle and displayed a large American Tourister suitcase and a small dark brown carrying bag. When these were opened plastic bags of white pills were revealed. Lamm then advised Wayne that he was ready to close the deal. Lamm then picked up the large suitcase and Wayne the smaller one.

They walked across the lot to the officers' pickup truck and placed the bags in the front seat of the pickup truck. At this point Wayne advised Lamm that, although the deal was for 50,000 pills, only 40,000 were contained in the two pieces of luggage. However, Wayne asserted that in forty-five minutes or so he could get the other 10,000 pills. Lamm stated that he did not want to wait, so they walked back into the restaurant and refigured the price. Lamm then telephoned McAdams and advised him to pay the money to the appellant.

Meanwhile, back at the Passport Inn in Birmingham, McAdams threw the money on the bed and told the appellant that he could start counting it because they had most of the merchandise. The words "start the count" was the signal for Officers Ware and Brooks to enter McAdams' room from the room next door. They did this and placed the appellant under arrest. The appellant was told to call Wayne at the restaurant in Sumiton and tell Wayne that everything was all right. Appellant did this.

The pills which the appellant sold Officer McAdams and which were delivered by Wayne to Officer Lamm were examined by the Alabama Department of Forensic Sciences,

Birmingham Division. The American Tourister suitcase was found to contain some 35,000 tablets and the other smaller bag was found to contain 5,051 tablets. Chemical analysis of the tablets revealed that they contained methaqualone.

In a trial by jury in Jefferson County appellant was found guilty and fined twenty-five thousand dollars ($25,000.00). The court sentenced appellant to fifteen (15) years imprisonment and fined him twenty-five thousand dollars ($25,000.00).

At the close of the State's evidence appellant made a motion to exclude the State's evidence on the grounds that the State failed to prove the methaqualone was a controlled substance. The trial court then allowed the State to reppen the case to introduce documents to prove that methaqualone was a controlled substance. Appellant claims that the trial court committed error by allowing the State to reopen its case and present evidence. To allow the State to reopen its case to prove that methaqualone was a controlled substance was not error. The trial court has the discretion to reopen its case and present evidence at any time prior to the close of final arguments. §15-14-4, Code of Alabama

1975. Williams v. State, Ala Cr. App., 364 So. 2d 717.

The documents introduced were copies of records of the State Board of Health certified as true records by the State Health Officer who has custody of those records. Certified copies of public records signed and certified by the officer who has lawful custody are admissible into evidence. Gamble, McElroy's Alabama Evidence, § 218.01 (1977).

These same documents were introduced in the case of Cassell v State, 55 Ala. App. 502, 317 So 2d 348, where it was held that methaqualone was properly placed on the schedule of controlled substances by the State Board of Health In that case the court also took judicial notice of the reasonable rules and regulations of the State Board of Health, having been duly adopted, which have the force and effect of law. All other elements of the case of selling methaqualone, a controlled substance, were proved by the State and the trial court was correct in overtuling appellant's motion to exclude the State's evidence.

During the closing argument of the State the prose-

cutor referred to appellant as a "dope dealer." Appellant objected and moved for a mistrial, but was overruled.

No matter how prejudicial the prosecutor's remarks may be they do not constitute reversible error if they are supported by the evidence. Davis v. State, 213 Ala. 541, 105 So. 677.

The evidence presented by the State showed that appellant sold tens of thousands of methaqualone tablets to the undercover agents. This drug is a controlled substance and one who is caught selling such tablets in such quantities is certainly engaged in selling "dope." The evidence showed that the same was carried out in a highly sophisticated and well organized manner, with a "bag man" to collect the money and a "drop man" to deliver the drugs, each in two widely separated locations. Incident to the sale appellant freely discussed the illegal drug business and sought to make future sales. Not only did he sell over forty thousand tablets of methaqualone but at the same time he offered to sell marijuana and cocaine. These facts were presented to the grand jury and were sufficient to justify the prosecutor in referring to appellant as a "dope dealer" during

the closing argument Ala Dig. Criminal Law, Key No. 722 (3)

We have carefully searched the record for errors injuriously affecting the substantial rights of appellant and have found none. The judgment of conviction is affirmed.

AFFIRMED.

All the Judges concur.

APPENDIX B

Ex parte Doyce Alon Ballenger

(Re Doyce Alon Ballenger

v.

State of Alabama).

81-59.

Supreme Court of Alabama.

December 18, 1981.

Certiorari to the Court of Criminal Appeals, 406 So. 2d 995.

BEATTY, Justice.

WRIT DENIED -- NO OPINION.

TORBERT, C.J., and MADDOX, JONES and SHORES, JJ., concur.

Opposition

Office - Supreme Court, U.S.
FILED
MAR 8 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1541

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1981

DOYCE ALON BALLENGER,

PETITIONER

V.

THE STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT OF
CRIMINAL APPEALS OF ALABAMA

BRIEF AND ARGUMENT OF RESPONDENT IN OPPOSITION TO THE PETITION

OF

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ATTORNEY GENERAL OF ALABAMA

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ATTORNEYS FOR PETITIONERS

QUESTION PRESENTED

ARE AN ACCUSED PERSON'S CONSTITUTIONAL RIGHTS VIOLATED WHEN A STATE TRIAL COURT ACCEPTS CERTIFIED COPIES OF PUBLIC RECORDS SHOWING A POINT OF LAW ABOUT WHICH THE COURT IS REQUIRED TO TAKE JUDICIAL NOTICE?

PARTIES

In the Court of Criminal Appeals and Supreme Court of Alabama the parties were Doyce Alon Ballenger and the State of Alabama.

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OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Alabama is reported as follows:

Ballenger v. State, (Cr. App. Ala., 1981) 406 So. 2d 995

The order of the Supreme Court of Alabama is reported as follows:

Ex parte: Ballenger, (S. Ct. Ala., 1981) 406 So. 2d 998

JURISDICTION

The Petitioner has invoked this Honorable Court's Jurisciction under Title 28, United States Code, Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is advancing his claim under Amendment Six of the Constitution of the United States.

STATEMENT OF THE CASE AND FACTS

I.

BACKGROUND

This case arose under the Alabama Uniform Controlled Substances Act, which is modeled on its Federal counterpart. As new drugs are invented and new findings published about established drugs it becomes necessary from time to time to add new drugs to the controlled list or take old ones off. The Alabama Statute provides two procedures by which this may be done: First, the State Board of Health after notice, hearing, findings and other procedural safeguards, can add or remove substances from the controlled list. Second, if the Federal Government controls a substance and publishes its action in the Federal Register, the substance becomes controlled in Alabama thirty days later, unless the State Board of Health moves to

prevent it. Title 20, Section 20-2-2(a) or (d), Code of Alabama, 1975. By the first method, methaqualone became controlled in Alabama on September 30, 1973. Minutes of the State Board of Health, September 30, 1973. If there was any defect in the State Board of Health's procedures, methaqualone nonetheless became controlled in Alabama on November 4, 1973. 38 Federal Register, No. 192, October 4, 1973, pp. 27516-27520. The controlled status of methaqualone was recognized by the Appellate Courts of Alabama as early as 1975. Cassell v. State, 55 Ala. App. 502, 317 So. 2d 348 (1975).

II.

THIS CASE

The Petitioner was indicted for selling a huge quantity of methaqualone to undercover officers on July 14, 1980.

(R. pp. 35-38, 102-107, 152-158 and 162-165).

On the trial of the cause after the State had rested, the Petitioner moved to exclude the State's evidence on the grounds that the State had not proved that Methaqualone was controlled on July 14, 1980. The trial court then allowed the State to re-open its case and presented certified copies of the minutes of the State Board of Health.

After conviction, the Petitioner appealed arguing, among other things, that methaqualone was not or at least was not proven to be a controlled substance. The Court of Criminal Appeals of Alabama held, among other things, that it was proper to introduce certified copies of public records and the controlled status of methaqualone was a matter of Judicial knowledge any way. Ballenger v. State (cr. App. Ala., 1981) 406 So. 2d 995,

997-998. The Court of Appeals affirmed the conviction on October 6, 1981, Ballenger v. State, supra.

The same claim was raised by Petition for a Writ of Certiorari in the Supreme Court of Alabama; the writ being denied on December 18, 1981. Ex parte: Ballenger (S. Ct. Ala., 1981) 406 So. 2d 998.

ARGUMENT

In the State Courts the Petitioner argued that the State had failed to prove that methaqualone was a controlled substance. The Petitioner insisted that under State law the controlled status of a drug was a fact which the State had to prove. This was the basis of the Petitioner's motion to exclude in the trial court, which occasioned the introduction of the certified copies of the minutes of the State Board of Health.

The Petitioner's argument ran afoul of the well established State Law holding that the rules and regulations of the State Board of Health have the force and effect of law and are, therefore, judicially noticed. Wheeler v. River Falls Power Co., 215 Ala. 655, 111 So. 907, 909 (1926). In other words, the controlled status of methaqualone was judicially known as a matter of law and it was wholly unnecessary for the State to prove it. Compare, Ballenger v. State (Cr. App. Ala., 1981) 406 So. 2d 995,[1] cert. den. 406 So. 2d 998.

Now, in this Honorable Court the Petitioner federalizes his claim by

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[1] "...In that case...[Cassell v. State, 55 Ala. App. 502, 317 So. 2d 348 (1975)]...the court also took judicial notice of the reasonable rules and regulations of the State Board of Health, having been duly adopted, which have the force and effect of law...." (406 So. 2d 995, 997-998).

casting it in terms of his right of confrontation. Even if we disregard the fact that the Petitioner's claim was never presented to the State Courts in these terms and the fact that courts commonly allow, even require, the introduction of verified documents, such as deeds, contracts, etc., as the best evidence of their contents, the Petitioner's claim is still frivolous. What the prosecutor did in this case was simply call the trial judge's attention to what his Honor already knew as a matter of law. The prosecutor could have accomplished the same purpose by merely citing the regulation to the judge, or handing the judge unverified photocopies of the materials. The fact that the prosecutor submitted certified copies and formally submitted them to the Court hardly seems grounds for a different result.

CONCLUSION

In conclusion, the Respondent respectfully submits that the petition presents no basis for review by this Honorable Court and no reason for granting the writ and the Respondent prays that the writ be denied.

CHARLES A. GRADDICK
ATTORNEY GENERAL OF
ALABAMA

JOSEPH G.L. MARSTON, III
ASSISTANT ATTORNEY
GENERAL

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Respondent, do hereby certify that on this the _____ day of March, 1982, I did serve the requisite number of copies of the foregoing on the attorneys of Record for Doyce Alon Ballenger, Petitioner, by mailing same to them, first class postage prepaid and addressed as follows:

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